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IN THE

Supreme Court of the United States

MAHMOUD CHERIF BASSIOUNI
a/k/a M. CHERIF BASSIOUNI,

Petitioner,

v.

FEDERAL BUREAU OF INVESTIGATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

STEVEN W. BECKER
c/o: IHRLI
DEPAUL UNIVERSITY COLLEGE OF LAW
25 East Jackson Boulevard
Eighth Floor
Chicago, Illinois 60604
(312) 362-5919

Attorney for Petitioner

205471

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Mahmoud Cherif Bassiouni a/k/a M. Cherif Bassiouni, Petitioner, pursuant to U.S. Supreme Court Rule 44(2), respectfully petitions this Court to reconsider its November 27, 2006, Order denying his petition for a writ of *certiorari* and to grant his petition for an adjudication on the merits or, alternatively, to vacate the opinion of the United States Court of Appeals for the Seventh Circuit, Case No. 04-3888, dated January 30, 2006, and remand the case for reconsideration following supplemental briefing and argument on the case-dispositive issue that the Seventh Circuit panel decided *sua sponte*.

REASON FOR GRANTING THE PETITION FOR REHEARING

REHEARING SHOULD BE GRANTED TO CLARIFY THIS COURT'S JURISPRUDENCE AND TO MAKE IT EXPLICIT THAT APPELLATE COURTS MAY NOT, CONSISTENT WITH PROCEDURAL DUE PROCESS, *SUA SPONTE* DECIDE A CASE-DISPOSITIVE ISSUE WITHOUT FIRST PERMITTING THE PARTIES TO FULLY BRIEF AND ARGUE THE ISSUE IN THE APPELLATE COURT. ALTERNATIVELY, THIS COURT SHOULD VACATE THE APPELLATE COURT'S DECISION AND REMAND THE CASE WITH INSTRUCTIONS THAT THE PANEL RECONSIDER ITS DECISION AFTER THE PARTIES ARE AFFORDED THE OPPORTUNITY TO SUBMIT SUPPLEMENTAL BRIEFS AND PRESENT ARGUMENT ON THE ISSUE AT BAR.

> "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."
>
> – *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

Relevant Factual Background

The instant case concerns a complaint for declaratory and injunctive relief filed by M. Cherif Bassiouni for amendment and expungement of highly prejudicial records being maintained in his personal Privacy Act file by the Federal Bureau of Investigation (FBI), which records describe the exercise of his First Amendment activities, in violation of 5 U.S.C. § 552a(e)(7) (2000). In particular, the FBI's records indicate that, in 1975, after conducting an investigation, the FBI concluded that Bassiouni "was not a member of any terrorist organization." Moreover, in its opinion, the Seventh Circuit panel admitted that "[n]one of the record memoranda concluded that Mr. Bassiouni was a member of a terrorist organization. Mr. Bassiouni denies any such membership, and the FBI concedes that it does not suspect him of ties to terrorist groups." Yet, the records in Bassiouni's FBI file contain references to and general descriptions of numerous organizations, a number of which are described as "terrorist" in nature, and one of which is currently named on the United States Department of State's List of Designated Foreign Terrorist Organizations. None of these descriptions, however, makes any reference to Bassiouni.

In support of its motion for summary judgment, the FBI submitted a public declaration of Supervisory Special Agent (SSA) James M. Krupkowski, in which he stated that, despite the agency's conclusion that "Mr. Bassiouni himself was not a member of any terrorist organization," it was likely that the FBI "will continue to receive information regarding Mr. Bassiouni" in the future. After both parties filed cross-motions for summary judgment, the district court entered judgment for the FBI (published at 2004 U.S. Dist. LEXIS 18515).

At oral argument on June 9, 2005, counsel for the FBI repeatedly asked the panel to consider *ex parte* a classified declaration of SSA Krupkowski, although such declaration was never submitted in the district court or considered by the district court judge in making her ruling, and was not contained in the record on appeal. Bassiouni's counsel objected at oral argument to the Court considering the classified declaration, as well as in a motion asking the Court to reconsider its subsequent directive ordering that the FBI produce the classified declaration for the first time on appeal.

On January 30, 2006, the Court of Appeals for the Seventh Circuit issued an opinion (published at 436 F.3d 712) affirming the decision of the district court, holding that it was not required to reach Bassiouni's request for expungement under subsection (e)(7) of the Privacy Act because, without "determin[ing] the precise limits of the term 'law enforcement activity,'" the Court "believe[s] that the purposes identified by the Bureau fall within 'authorized law enforcement activity' conducted by the FBI." Significantly, the Court confirmed that it considered the FBI's classified declaration *in camera* in rendering its decision. Furthermore, the Court admitted that, in considering the secret FBI declaration, it failed to "hold fast to . . . Federal Rule of Appellate Procedure 10," which requires that documents must be made part of the record in order to be considered on appeal.

The Seventh Circuit subsequently denied Bassiouni's request for rehearing *en banc* on April 27, 2006 (published at 2006 U.S. App. LEXIS 10807).

Legal Analysis

"The core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). *See* U.S. CONST. amends. V, XIV. Accordingly,

> appellate courts should not render decisions that adversely impact the life, liberty, or property of a party without giving that party an opportunity to be heard on the issue that the court deems dispositive. Appellate courts do just that, however, when they render *sua sponte* decisions. Thus, these decisions are fundamentally inconsistent with the due process guarantees of the United States Constitution.

Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at* Sua Sponte *Decisions by Appellate Courts*, 69 TENN. L. REV. 245, 263 (2002). *See* Barry A. Miller, Sua Sponte *Appellate Rulings: When Courts Deprive Litigants of an Opportunity to be Heard*, 39 SAN DIEGO L. REV. 1253, 1305 (2002) ("It is relatively easy to conclude that courts should give notice and an opportunity to be heard before deciding issues *sua sponte*; in most cases the costs are low and the benefits are high. Ordering supplemental briefing (or a similar procedure) meets the due process objection to *sua sponte* decisions . . . .").

This Court's decision in *United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439 (1993), stands for the proposition that, although an appellate court may *raise* an issue *sua sponte*, "an appellate court abuses its judicial discretion" where it *sua sponte decides* an issue "without giving the parties an opportunity to address it." Milani & Smith, 69 TENN. L. REV. at 290. *See id.* at 287 (noting that *Independent Insurance* "suggests that *sua sponte* decision making is an abuse of judicial discretion").

At issue in *Independent Insurance* was whether 12 U.S.C. § 92, which permits national banks located in small communities to sell insurance to customers outside those communities, had been inadvertently repealed in 1918.

See Independent Insurance, 508 U.S. at 441. Although the district court noted that the statute may have been repealed, the respondents had not asked the district court to rule that section 92 no longer existed, and they took the same position before the Court of Appeals for the District of Columbia Circuit, noting in their brief that all the relevant parties had assumed the provision's validity. *Id.* at 444. Nevertheless, the Court of Appeals directed the parties to be prepared to address the status of section 92 at oral argument, and, after oral argument (at which respondents' counsel declined to argue that the provision was no longer in force), it ordered supplemental briefing on the issue. *Id.* In their supplemental brief, respondents urged the reviewing court to decide the question but took no position on whether section 92 was valid law. *Id.* The Court of Appeals, however, did address the issue and held that Congress had repealed section 92 in 1918. *Id.* at 444-45.

Before reviewing the merits of the appellate court's decision on section 92's continued validity, this Court first addressed the petitioner's argument that the Court of Appeals had no authority to consider the issue because the respondents failed to challenge the law's validity throughout the proceedings and, second, answered the question of whether the appellate court abused its discretion in *sua sponte* deciding the issue. *Id.* at 445. As to the first inquiry, this Court held that "[i]n addressing the status of section 92, the Court of Appeals did not stray beyond its constitutional or prudential boundaries." *Independent Insurance*, 508 U.S. at 447. With respect to the second question, the Court held that "*[a]fter giving the parties ample opportunity to address the issue*, the Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law" and thus ruled that the appellate court did not abuse its discretion. *Id.* at 448 (emphasis added).

In highlighting that the appellate court gave the parties "ample opportunity to address the issue," the Court's language "suggests that this fact led the Court to conclude that there was no abuse of judicial discretion" and "suggests that the result would have been different had the court of appeals not given the parties 'ample opportunity' to address the *sua sponte* issue." Milani & Smith, 69 TENN. L. REV. at 289-90. Accordingly, *Independent Insurance* stands for the principle that a reviewing court cannot *sua sponte* decide an outcome-determinative issue without giving the parties a meaningful opportunity to address it. *See id.* at 290.

More recently, in *Trest v. Cain*, 522 U.S. 87 (1997), this Court again strongly suggested that, before *sua sponte* deciding an issue, the appellate court should provide the parties with an opportunity to present argument. More specifically, in *Trest*, the State of Louisiana, in a habeas corpus case, asked this Court "to go beyond the question presented and hold that the law permitted (though it did not require) the Fifth Circuit to raise the procedural default *sua sponte*." *Trest*, 522 U.S. at 90. This Court, however, declined to do so. *Id.* at 90-91. Yet, the Court noted that had the Fifth Circuit "not decided the procedural default question without giving the parties an opportunity for argument," the parties might have considered such matters, and the Court of Appeals could have considered their relevance or their answers. *Id.* at 92. This Court then stated that "[w]e do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home.[']" *Id.*

Furthermore, where, as in the instant matter, a reviewing court "decides a case on an issue raised *sua sponte* without input from the parties, it should grant motions for rehearing filed by the losing party as matter of right." Milani & Smith, 69 TENN. L. REV. at 304. *See id.* ("If a court fails to grant a

rehearing in these situations, the end result is a violation of due process because there was no opportunity to be heard before or after judgment."). *See Adoption of Alexander S. v. Tudor G.*, 750 P.2d 778, 782-83 (Cal. 1988) (reversing *sua sponte* decision by the court of appeal where the appellate court refused to permit a request to submit supplemental briefs on a point raised for the first time at oral argument).

In this regard, this Court has a long history of requesting supplemental briefing and argument after raising an issue *sua sponte*. For example, in the course of the Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court asked for two sets of supplemental briefs and oral arguments. After the initial argument in the case, the Court asked the parties to file briefs and present argument on five different major points. *See Brown v. Board of Education*, 345 U.S. 972, 972-73 (1953). In addition, the Court subsequently requested briefing and argument from the U.S. Attorney General, as well as from the Attorneys General of the states requiring or permitting segregation in public education. *See Brown*, 347 U.S. at 495-96. *See also Dickerson v. United States*, 530 U.S. 428, 441 n.7 (2000) (inviting professor as *amicus curiae* to argue in support of the constitutionality of 18 U.S.C. § 3501, where no party in the underlying litigation argued in favor of the provision).

In the present case, the Seventh Circuit *sua sponte* decided the outcome of Bassiouni's case based upon *in camera* consideration of a classified FBI declaration that was submitted for the first time after oral argument, was never filed in the district court, was not relied upon by the district court judge, was not made part of the record on appeal, and regarding which the parties were never given the opportunity to file merits briefs or orally argue. As far as Bassiouni is aware, such a procedure is unprecedented in the annals of American jurisprudence. The extraordinarily egregious violation of procedural due process in this case provides this

Court with the perfect opportunity to clarify its holdings in *Independent Insurance* and *Trest*, and to make explicit what it has previously strongly suggested, *viz.*, that an appeliate court violates procedural due process where it *sua sponte* decides a case-dispositive issue without first affording the parties the opportunity to brief and argue the issue. If this Court declines to reconsider Bassiouni's petition for writ of *certiorari* on the merits on this ground, then, at a minimum, the Court should vacate the Seventh Circuit's decision and remand the case for reconsideration on this issue following supplemental briefing and argument.

Accordingly, this Court should grant Bassiouni's petition for rehearing.

CONCLUSION

For the reasons set forth above, the Petitioner, M. Cherif Bassiouni, respectfully prays that this Court grant his petition for rehearing and that a writ of *certiorari* issue to review the decision of the Seventh Circuit Court of Appeals. Alternatively, Bassiouni prays that this Court vacate the decision of the Seventh Circuit and remand the case for reconsideration following the opportunity for supplemental briefing and argument.

Respectfully submitted,

STEVEN W. BECKER
c/o: IHRLI
DePaul University College of Law
25 East Jackson Boulevard
Eighth Floor
Chicago, Illinois 60604
(312) 362-5919

Attorney for Petitioner

CERTIFICATE OF GOOD FAITH

The undersigned hereby certifies that this petition for rehearing is restricted to the grounds specified in Rule 44.2 of the Rules of the Supreme Court and is presented in good faith and not for delay.

